Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

ANGELA RUBBO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Appeals Court erred in dismissing petitioner's appeal upon her waiver in light of *United States v. Booker*, 543 U.S. __, 125 S.Ct. 738 (2005).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL PROVISIONS INVOKED	2
AMENDMENT V	2
AMENDMENT VI	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
I. THE APPEALS COURT ERRED IN DISMISSING THE PETITIONER'S APPEAL UPON HER WAIVER, WHICH IS CONTRARY TO THE HOLDING IN UNITED STATES V. BOOKER	5
CONCLUSION	6
APPENDIX A	1a
APPENDIX B	2a
APPENDIX C	11a

TABLE OF AUTHORITIES

CASES	Page
Blakely v. Washington, 542 U.S. __, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)	3, 4, 5
United States v. Booker, 543 U.S. __, 125 S.Ct. 738, 160 L.Ed.2d 21 (2005)	4
United States v. Hughes, 396 F.3d 374 (4 Cir. 2005)	5
United States v. Rubbo, 396 F.3d 1330 (11 Cir. 2005)	1
United States v. West, 392 F.3d 450 (D.C. Cir. 2004)	4

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit in this matter is an unpublished opinion under the following caption: *United States v. Rubbo*, 396 F.3d 1330 (11 Cir. 2005), and is contained in the appendix as A.1. The decision was issued 21 January 2005. Rehearing was denied on 10 March 2005 [A.2].

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eleventh Circuit, was rendered on 21 January 2005 with the Rehearing being denied on 10 March 2005. This Petition is within 90 days thereof [Supreme Court Rule 13]. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOKED

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the rights to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Angela Rubbo was charged by a sixty three count Indictment returned by a Grand Jury sitting in the Southern District of Florida and charged with mail fraud, wire fraud, money laundering and various conspiracies.

Ms. Rubbo, through counsel, was able to negotiate down to one count for a plea, to wit: Conspiracy to commit wire and mail fraud, charged under 18 U.S.C. §371.

As the Appellate decision [hereinafter sometimes for brevity *Rubbo, supra*] notes:

> In return for the government agreeing to dismiss the remaining sixty two counts against her and for other favors at sentencing, Rubbo agreed to plead guilty, cooperate and waive her right to appeal any sentence she received subject to a few exceptions.

After sentencing, Petitioner through counsel filed a Notice of Appeal, and thereafter through present counsel filed a Brief, "contending that the impositions of the enhancements were erroneous applications of the guidelines" [*Rubbo, supra*].

The Government then filed a Motion to Dismiss the Appeal predicated upon the waiver, and, as the Appellate Court observed:

> Rubbo filed a reply to the government's dismissal motion in which she indicated that in light of the intervening decision in *Blakely v. Washington*, 542 U.S. __, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) she wanted to raise the issue of whether the judge imposed enhancements she had attached in her initial brief, which coincidentally had been filed on the very date that *Blakely* was released, were unconstitutionally imposed in violation of the Sixth Amendment. Rubbo argued [and this is the crux of the instant Petition] that issue was outside the scope of the appeal waiver because, if she were right on the merits of it, the sentence imposed on her exceeded the 'statutory maximums' as defined in *Blakely* and her waiver explicitly excepted sentences in excess of the statutory maximums.

The Appellate Court then set out the waiver highlighting the exception, "unless the sentence exceeds the maximum permitted by statute", and found that "Rubbo's position is not outlandish. The plea agreement language permitting her to escape the waiver if 'the sentence exceeds the maximum

permitted by statute' is semantically similar to the 'statutory maximum' term that was a key component of the Supreme Court's reasoning and analysis in *Blakely*". As the Court also observed two days before oral argument in the instant case this Court decided *United States v. Booker*, 543 U.S. __, 125 S.Ct. 738, 160 L.Ed.2d 21 (2005).

The Court then engaged in some legal "wrestling" to explain its ultimate decision.

The Court interpreted the intent of the parties and the contract [plea agreement] and held that under the terms of the agreement statutory maximum meant the five year statutory maximum per 18 U.S.C. §371, cited to the recent decision of the D.C. Circuit in *United States v. West*, 392 F.3d 450 (D.C. Cir. 2004), and concluded:

> In summary, the right to appeal a sentence based on *Apprendi/Booker* grounds can be waived in a plea agreement. Broad waiver language covers those grounds of appeal. Absent some indication that the parties intended otherwise, when an exception to an appeal waiver is stated in terms of a sentence imposed in excess of the statutory maximum, those terms should be given their ordinary and natural meaning. Ordinarily and naturally, "statutory maximum" and "the maximum permitted by statute" refer to the longest sentence that the statute which punishes a crime permits a court to impose, regardless of whether the actual sentence must be shortened in a particular case because of the principles involved in the *Apprendi/Booker* line of decisions.

REASONS FOR GRANTING THE WRIT

I. THE APPEALS COURT ERRED IN DISMISSING THE PETITIONER'S APPEAL UPON HER WAIVER, WHICH IS CONTRARY TO THE HOLDING IN *UNITED STATES V. BOOKER*

The Petitioner has set out above the necessary elements for the Court to review this matter. Petitioner submits, most respectfully, to the Eleventh Circuit, that when that Court suggests that this Court statutory maximum definition in *Apprendi*, *Blakely* and *Booker* are specialized, "which is to say a non-natural sense . . . not only for semantic convenience but also to justify and explain the holdings the Court entered in those decisions", it is seeking to find a way to avoid deciding the way those decisions say it must.

As she did in her Petition for Rehearing, the Petitioner would suggest the Court consider the decision of the Fourth Circuit in *United States v. Hughes*, 396 F.3d 374 (4 Cir. 2005), as to the plain error aspects of what occurred below.

The Petitioner submits that the definition of this Court as to what statutory maximum means in a sentencing scheme ought to apply to the plea agreement at issue herein, particularly in light of the objected to factual enhancement found by the Judge.

CONCLUSION

For all of the foregoing, a writ of certiorari ought issue to the United States Court of Appeals for the Eleventh Circuit to review the decision at issue and enter whatever other orders are appropriate.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[March 10, 2005]

No. 04-10874-II

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ANGELA ANN RUBBO, a.k.a. Angie,
Defendant-Appellant,

On Appeal from the United States District Court for the Southern District of Florida

---

BEFORE: CARNES and COX, *Circuit Judges*, and MILLS*, *District Judge*.

BY THE COURT:

Appellant's "Petition for Rehearing . . .," which is construed as a motion for reconsideration for this Court's January 21, 2005, Order, dismissing this appeal due to a valid appeal waiver contained in Appellant's plea agreement, is DENIED.

---

* Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 04-10874

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANGELA ANN RUBBO, a.k.a. Angie,
Defendant-Appellant.

Jan. 21, 2005

Before CARNES and COX, *Circuit Judges*, and MILLS*, *District Judge*.

CARNES, *Circuit Judge*:

This Court has previously upheld the enforceability of appeal waivers that are knowingly and voluntarily entered. *E.g., United States v. Bushert*, 997 F.2d 1343 (11th Cir.1993). We have explained how they serve important interests of the defendant as well as the government, *United States v. Buchanan*, 131 F.3d 1005, 1008 (11th Cir.1997), and we could have added the judicial system itself to the list of beneficiaries. We have also held that "[a] waiver of the right to appeal includes a waiver of the right to appeal difficult or debatable legal issues—indeed, it includes a waiver of the right to appeal blatant error." *United States v. Howle*, 166 F.3d 1166, 1169 (11th Cir.1999) (footnote omitted). Angela Rubbo does not dispute any of that, but she does

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* Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

contend that the appeal waiver she agreed to as part of her plea bargain ought not prevent her from raising sentencing issues arising under the Supreme Court's recent decision in *United States v. Booker*, 543 U.S. ___, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Her argument centers around the "maximum permitted by statute" exception in the waiver she entered. It is an interesting argument, but ultimately not a persuasive one.

A sixty-three count indictment charged Rubbo with mail fraud, wire fraud, money laundering, and various conspiracies, stemming from a multi-million dollar telemarketing fraud operation that she and her three sons ran. Through plea negotiations with prosecutors, Rubbo's attorney managed to whittle the charges down to one: conspiracy to commit mail and wire fraud in violation of 18 U.S.C. § 371. In return for the government agreeing to dismiss the remaining sixty-two counts against her and for other favors at sentencing, Rubbo agreed to plead guilty, cooperate, and waive her right to appeal any sentence she received subject to a few exceptions. After two hearings, the district court granted Rubbo's motion to change her plea to guilty, accepted that new plea, and adjudicated Rubbo guilty of the one count of violating § 371. During the course of one of those hearings, the district court engaged in a colloquy with Rubbo in which it ensured that she fully understood the appeal waiver part of her plea agreement and voluntarily consented to it. To the extent that Rubbo contends that she did not knowingly and voluntarily agree to the appeal waiver, we reject that contention because it is inconsistent with the record.

At sentencing, over Rubbo's objections the district court imposed two enhancements. One was a two-level enhancement either because the offense involved relocating a fraudulent scheme to another jurisdiction to elude law enforcement, U.S.S.G. § 2F1.1(b)(5)(A) (Nov.1998), or because it used sophisticated means, U.S.S.G. § 2F1.1(b)(5)(C) (Nov.

1998). The other was a two-level enhancement for being an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, pursuant to U.S.S.G. § 3B1.1(c) (Nov.1998). The district court ultimately sentenced Rubbo to forty-eight months' imprisonment, twelve short of the statutory cap of sixty months for the crime. *See* 18 U.S.C. § 371.

Notwithstanding her promise that she would not appeal, Rubbo did. She filed a brief contending that the impositions of the enhancements were erroneous applications of the guidelines. The government responded with a motion to dismiss Rubbo's appeal based on the waiver. *See generally Buchanan*, 131 F.3d at 1008-09 (dismissal of appeal based on waiver should, if possible, occur on motion before the government's brief is filed).

Rubbo filed a reply to the government's dismissal motion in which she indicated that in light of the intervening decision in *Blakely v. Washington*, 542 U.S. ___, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), she wanted to raise on appeal the issue of whether the judge-imposed enhancements she had attacked in her initial brief, which coincidentally had been filed on the very day that *Blakely* was released, were unconstitutionally imposed in violation of the Sixth Amendment. Rubbo argued that issue was outside the scope of her appeal waiver because, if she were right on the merits of it, the sentence imposed on her exceeded the "statutory maximum" as defined in *Blakely* and her waiver explicitly excepted sentences in excess of the statutory maximum.[1]

---

[1] Because Rubbo did not raise the *Blakely* issue in her opening brief, the government contends that she is procedurally barred from arguing it. *See United States v. Levy*, 379 F.3d 1241, 1242-45 (11th Cir.) (*Blakely*-type claim waived by failure to raise it in initial brief on appeal), *reh'g denied*, 391 F.3d 1327 (en banc) (2004); *see also United States v. Njau*, 386 F.3d 1039, 1042 (11th Cir.2004) (same).

Rubbo urges us not to apply the usual rule because she told the government in her response to its motion to dismiss that she was going to raise the *Blakely* issue and thereby gave the government an opportunity to brief the issue in its own opening brief. We need not address that novel procedural argument because Rubbo's appeal is due to be dismissed as a result of the appeal waiver irrespective of any procedural bar.

The appeal waiver paragraph in the plea agreement that Rubbo signed says this:

> The defendant is aware that Title 18, United States Code, Section 3742 affords the defendant the right to appeal the sentence imposed in this case. Acknowledging this, in exchange for the undertakings made by the United States in this plea agreement, the defendant hereby waives all rights conferred by Title 18, United States Code, Section 3742 to appeal any sentence imposed, including any restitution order, or to appeal the manner in which the sentence was imposed, *unless the sentence exceeds the maximum permitted by statute* or is the result of an upward departure from the guideline range the Court establishes at sentencing. The defendant further understands that nothing in this plea agreement shall affect the government's right and/or duty to appeal as set forth in 18 U.S.C. § 3742(b). However, if the United States appeals the defendant's sentence pursuant to Section 3742(b), the defendant shall be released from the waiver of appellate rights. The defendant understands that, although the defendant will be sentenced in conformity with the Sentencing Guidelines, by this agreement the defendant waives the right to appeal the sentence on the basis that the sentence is the result of an incorrect application of the Sentencing Guidelines.

The general waiver language—"all rights conferred by Title 18, United States Code, Section 3742 to appeal any sentence imposed, including any restitution order, or to appeal

the manner in which the sentence was imposed"—certainly is broad enough to cover any issues arising from *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and its progeny, up to and including *Booker*. Rubbo has not contended to the contrary. Her point is that there is an exception to that broad waiver. We have emphasized in the block quote the language setting out that exception, which is the linchpin to Rubbo's contention that her appeal waiver does not apply.

Rubbo's position is not outlandish. The plea agreement language permitting her to escape the waiver if "the sentence exceeds the maximum permitted by statute" is semantically similar to the "statutory maximum" term that was a key component of the Supreme Court's reasoning and analysis in *Blakely*. In its opinion in that case, the Court gave this definition of that term: "Our precedents make clear, however, that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 124 S.Ct. at 2537 (emphasis omitted). Two days before we heard oral argument in this case, the Supreme Court released its *Booker* decision, and the *Blakely* issue discussed in Rubbo's opposition to the motion to dismiss this appeal became a *Booker* issue. The Supreme Court in *Booker* quoted the "statutory maximum" definition from its *Blakely* opinion. *See Booker*, 125 S.Ct. at ___, 2005 WL 50108, at *7.

Because the sentence the district court imposed on Rubbo goes beyond that permitted on the basis of the facts she admitted during her plea colloquy, Rubbo contends that it exceeds the statutory maximum sentence for *Booker* purposes. Given that, she says that her sentence "exceeds the maximum permitted by statute" for purposes of the exception to the appeal waiver contained in her plea agreement. The problem with Rubbo's contention is its invisible premise,

which is that the "statutory maximum" for *Booker* purposes is the same thing as "the maximum permitted by statute" for purposes of Rubbo's appeal waiver. The two are not the same. The context in which the terms are used and the meaning they convey are different. After all, "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425, 38 S.Ct. 158, 159, 62 L.Ed. 372 (1918) (Holmes, J.).

In the *Apprendi/Booker* line of decisions, the Supreme Court used the term "statutory maximum" to describe the parameters of the rule announced in those decisions, a rule that had nothing to do with the scope of appeal waivers. *Booker*, 125 S.Ct. at 748, 2005 WL 50108, at *7; *Blakely*, 124 S.Ct. at 2536-37; *Apprendi*, 530 U.S. at 487 n. 13 & 490, 120 S.Ct. at 2361 n. 13 & 2362-63. The term was defined in a specialized, which is to say a non-natural, sense. It was defined that way not only for semantic convenience but also in order to justify and explain the holdings the Court entered in those decisions. Everyone knows that a judge must not impose a sentence in excess of the maximum that is statutorily specified for the crime. *See, e.g., Bushert*, 997 F.2d at 1350 n. 18 (describing as "axiomatic" the rule that "a court of the United States may not impose a penalty for a crime beyond that which is authorized by statute"). By labeling a sentence that the judge may not impose under the *Apprendi/Booker* doctrine as one in excess of the "statutory maximum," the Court may have sought to call into play that well-known principle of law.

Whether it did, however, is not the point for present purposes. The point here is that the definition of "statutory maximum" the Supreme Court used to describe and explain its holdings in those cases says nothing about what Rubbo and the government meant when they used the term "the

maximum permitted by statute" in the appeal waiver. This is not a matter of legal research. It is a question of the parties' intent.

Plea bargains, we have recognized, are like contracts and should be interpreted in accord with what the parties intended. *See Howle*, 166 F.3d at 1168 ("A plea agreement is, in essence, a contract between the Government and a criminal defendant."); *Allen v. Thomas*, 161 F.3d 667, 671 (11th Cir.1998) ("[W]e have said that the construction of plea agreements is governed generally by the principles of contract law, as we have adapted it for purposes of criminal law . . . .") (internal marks and citation omitted); *United States v. Knight*, 867 F.2d 1285, 1288 (11th Cir.1989) ("When [the defendant] accepted the plea offer, her discussions with [a DEA agent] were no longer with a view to an agreement; the negotiations had ended and a plea contract was formed."). There is nothing to indicate that when these parties used the language "exceeds the maximum permitted by statute" to describe the sentence from which Rubbo would be permitted to appeal they intended those words to have anything other than their usual and ordinary meaning. That meaning describes the upper limit of punishment that Congress has legislatively specified for violation of a statute; for example, five years for violation of 18 U.S.C. § 371.

For purposes of the exception to the appeal waiver, the parties chose to define the maximum sentence in terms of what is "permitted by statute," not in terms of what is permitted by the *Apprendi* line of decisions that was evolving at the time. We asked counsel for Rubbo at oral argument whether there was anything in the record to indicate that the parties intended to reserve a right for her to appeal any *Apprendi*-type issues. He replied with commendable candor that there was not, and that if that had been the intent Rubbo would have raised an *Apprendi* issue at the sentence proceeding, which she did not.

We take our final point from the D.C. Circuit's decision last month in *United States v. West*, 392 F.3d 450 (D.C. Cir.2004), which addressed the question of whether an exception to a waiver allowing a defendant to appeal if "the Court sentences [him] to a period of imprisonment longer than the statutory maximum" permitted an appeal on *Apprendi/Blakely* grounds. The defendant in that case also relied upon the definition of "statutory maximum" contained in the *Blakely* opinion, but the Court rejected as implausible the idea that the parties could have intended that meaning. *Id.* The Court added that giving such an interpretation to the term "statutory maximum" would also be inconsistent with other provisions of the plea agreement, thereby violating a cardinal principle of contract interpretation that a writing is to be interpreted as a whole. *Id.* (citing Restatement (Second) of Contracts § 202(2) (1981)). It would be inconsistent because other provisions of the plea agreement set out the statutory maximum punishments the defendant could receive for the two charges and, of course, they did so in terms of the punishment permitted under the terms of the statutes themselves. *Id.*

The same is true in the present case. A provision in the plea agreement states that Rubbo understands and acknowledges that "the Court may impose a statutory maximum term of imprisonment of up to five (5) years, followed by a term of supervised release of up to three (3) years, and a fine of up to $250,000," and may order the defendant to pay restitution. In that provision, "statutory maximum" unquestionably means the maximum permitted by the statute itself, undiminished by any *Apprendi/Booker* considerations. If we were to read the language in the appeal waiver provision in this same agreement to mean anything else, we would be interpreting materially identical terms in the same contract to mean substantially different things. That we will not do.

In summary, the right to appeal a sentence based on *Apprendi/Booker* grounds can be waived in a plea agreement. Broad waiver language covers those grounds of appeal. Absent some indication that the parties intended otherwise, when an exception to an appeal waiver is stated in terms of a sentence imposed in excess of the statutory maximum, those terms should be given their ordinary and natural meaning. Ordinarily and naturally, "statutory maximum" and "the maximum permitted by statute" refer to the longest sentence that the statute which punishes a crime permits a court to impose, regardless of whether the actual sentence must be shortened in a particular case because of the principles involved in the *Apprendi/Booker* line of decisions.

The government's motion to dismiss this appeal on the basis of the appeal waiver is granted.

APPEAL DISMISSED.

APPENDIX C

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Case No. 04-10874-I

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

ANGELA RUBBO,
Defendant/Appellant,

On Appeal From The United States District Court
For The Southern District Of Florida

PETITION FOR REHEARING, OR ALTERNATIVE
REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for Appellant certifies that to his best knowledge no new individuals have been added to the Certificate of Interested Persons previously filed with the Court.

FEDERAL RULE OF APPELLATE PROCEDURE 35 STATEMENT FOR EN BANC CONSIDERATION

The Appellant seeks also Rehearing En Banc as an alternative to a Panel Rehearing.

The Appellant, pursuant to Rule 35(b) would urge that the "proceeding involves one or more questions of exceptional importance", that is the interpretation of "statutory maximum" vis a vis the Supreme Court decisions, the effect of objection to the sentence calculations and enhancements and the effect of *United States v. Booker* on cases on direct appeal in light of the appeal waiver.

STATEMENT OF THE ISSUE

1. Whether the panel decision, albeit upholding an appeal waiver for the grounds stated, in fact conflicts with the intent of the decisions of the Supreme Court, as well as fails to address the plain error aspects of appeal of pipeline cases where the sentence was the subject of objection.

ARGUMENT IN SUPPORT OF PETITION

The Court, in its own opinion in the matter, recognized that, "Rubbo's position", regarding the exception to her appeal waiver vis a vis the language of the plea agreement, that is that she may appeal if . . . . "the sentence exceeds the maximum permitted by statute or is the result of an upward departure from the guideline range the Court establishes at sentencing . . . ." was not outlandish [Opinion at page 2], but in fact dismissed the appeal.

This Court, in its opinion also found that "at sentencing the district court imposed over Rubbo's objections two enhance-

ments", but then sentenced her to less than the statutory maximum for a Title 18 §371 conspiracy [5 years] but more than the statutory maximum as that was defined by the Court, at the least, in *Blakely v. Washington*, 542 __US__, 124 S.Ct. 2531 (2004) as further explained in *United States v. Booker*, 543 __US__ (2005).

Thus, while as the undersigned conceded at oral argument, no "Apprendi" type[1] issues were raised by trial counsel, that counsel certainly objected to the Appellant receiving enhancements, that is, sentence increases above what she admitted. Thus the sentence was in fact the subject of objection as opposed to a situation of a non objected to sentence being challenged [see: *In Re: Jerry J. Anderson*, 18 FLW Fed.C 183 (11 Cir. 2005) decided the same day as the instant case].

While the "Apprendi" language in the instant case was not used, the trial Judge and the prosecutor were aware the Appellant felt this was at the least an objected to upward departure from the offense level to which the Defendant agreed or admitted at sentencing. Appellant submits that even without the magic "Apprendi" words the objections were sufficient to preserve the record for appeal before this Court. At the least, the full Court should, respectfully, visit the issue, on this direct appeal "pipeline" case.

One could argue, it is respectfully submitted, that this sentence could even constitute reversible "plain error", [see *United States v. Hughes*, __ F.3d __ 2005 WL 147059 (4 Cir. 2005)].

In that case the Court stated the following:

> The *Booker* Court concluded that this remedial scheme should apply not only to those defendants, like Booker, whose sentences had been imposed in violation of the

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[1] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000).

> Sixth Amendment, but also to those defendants, like Fanfan, who had been sentenced under the mandatory regime without suffering a constitutional violation. *See id.* at 25 (stating that Fanfan's sentence did not violate the Sixth Amendment but noting that "the Government (and the defendant should he so choose) may seek resentencing under the system set forth in today's opinions"); *id.* ("[W]e must apply today's holdings—both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act—to all cases on direct review.").
>
> B.
>
> Hughes' sentence exceeded the maximum sentence then authorized by the facts found by the jury alone, in violation of *Booker*. However, Hughes raised this issue for the first time on appeal. Because this issue was not advanced in the district court, we review the district court decision for plain error. *See* Fed.R.Crim.P. 52(b); *United States v. Olano*, 507 U.S. 725, 731-32, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Notwithstanding the heavy burden that a defendant faces when alleging plain error in sentencing, we conclude that the district court plainly erred in imposing a sentence on Hughes that exceeded the maximum allowed based on the facts found by the jury alone.

Further, and again, respectfully apropo of what the Court ought to consider, or indeed, may have not considered when upholding a waiver is the magnitude of the error. The *Hughes* Court continued:

> To demonstrate that the error was prejudicial, Hughes must show that "the error actually affected the outcome of the proceedings." *Id.* Here, the error alleged by Hughes was that the district court imposed a sentence greater than the maximum authorized by the facts found by the jury alone. Had the district court imposed a sen-

> tence within that maximum, Hughes' sentence would have been calculated according to an Offense Level of 10 (corresponding to a prescribed range of 6 to 12 months' imprisonment)—markedly lower than the final Offense Level of 22 (corresponding to a prescribed range of 41 to 51 months' imprisonment) used by the district court. We therefore conclude that the error affected Hughes' substantial rights. *Accord United States v. Promise*, 255 F.3d 150, 160 (4th Cir.2001) (en banc) (holding that *Apprendi* error resulting in increased sentence affected defendant's substantial rights).

Appellant submits a sentencing error that affects substantial rights can well equate to an error that, "exceeds the maximum permitted by statute" as defined by the Supreme Court in *Blakely/Booker*, and permits review even under the plea agreement and again Appellant submits the full Court ought consider the same.

The Appellant recognizes that, as this Court observed in its opening paragraphs of the *Rubbo* opinion:

> This Court has previously upheld the enforceability of appeal waivers that are knowingly and voluntarily entered. *E.G., United States v. Bushert*, 997 F.2d 1343 (11th Cir. 1993). We have explained how they serve important interests of the defendant as well as the government, *United States v. Buchanan*, 131 F.3d 1005, 1008 (11th Cir. 1997), and we could have added the judicial system itself to the list of beneficiaries. We have also held that "[a] waiver of the right to appeal includes a waiver of the right to appeal difficult or debatable legal issues-indeed, it includes a waiver of the right to appeal blatant error." *United States v. Howle*, 166 F.3d 1166, 1169 (11th Cir. 1999) (footnote omitted).

And, the Appellant acknowledges the Court's conclusion, that is:

> In summary, the right to appeal a sentence based on *Apprendi/Booker* grounds can be waived in a plea agreement. Broad waiver language covers those grounds of appeal. Absent some indication that the parties intended otherwise, when an exception to an appeal waiver is stated in terms of a sentence imposed in excess of the statutory maximum, those terms should be given their ordinary and natural meaning. Ordinarily and naturally, "statutory maximum" and "the maximum permitted by statute" refer to the longest sentence that the statute which punishes a crime permits a court to impose, regardless of whether the actual sentence must be shortened in a particular case because of the principles involved in the *Apprendi/Booker* line of decisions.

The Court had cited to the D.C. Circuit's decision in *United States v. West*, 392 F.3d 450 (D.C. Cir. 2004).

However, respectfully, there is nothing to indicate the Defendant waived *Blakely/Apprendi* issues and, the objections posited by the trial counsel contested the sentence being imposed so that the waiver ought not apply.

Certainly the prosecutors, the Government attorneys were as aware as any defense attorney of the emerging possibilities of *Apprendi/Blakely* [compare this Court's opinion denying rehearing en banc in *United States v. Levy*, 391 F.3d 1327 (11th.Cir. 2004)] regarding, inter alia, the persistence of the "*Griffith v. Kentucky*" 479 U.S. 314, 107 S.Ct. 708 (1987) counsel, and the presentations of the issues.

The Appellant, based upon the above respectfully urges the Court to hear the matter en banc, or alternatively for the panel to reconsider the same.

Supreme Court, U.S.
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(2)

No. 04-1663

In the Supreme Court of the United States

ANGELA RUBBO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly dismissed petitioner's appeal on the ground that petitioner's challenge to her sentence was encompassed within an appeal-waiver provision of her plea agreement.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 11

TABLE OF AUTHORITIES

Cases:

Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 8
Blakely v. *Washington*, 124 S. Ct. 2531 (2004) 8
United States v. *Blick*, 408 F.3d 162 (4th Cir. 2005) 8
United States v. *Bond*, 414 F.3d 542 (5th Cir. 2005) 7
United States v. *Booker*, 125 S. Ct. 738 (2005) ... 5, 9, 10
United States v. *Bournes*, 405 F.3d 634 (7th Cir. 2005) 7
United States v. *Cortez*, 413 F.3d 502 (5th Cir. 2005) 8, 9
United States v. *Green*, 405 F.3d 1180 (10th Cir. 2005) 7, 9
United States v. *Grinard-Henry*, 399 F.3d 1294 (11th Cir.), cert. denied, 125 S. Ct. 2279 (2005) 7
United States v. *Haynes*, 412 F.3d 37 (2d Cir. 2005) 7

Cases—Continued: Page

United States v. *Johnson*, 410 F.3d 137 (4th Cir. 2005) 7

United States v. *Lockett*, 406 F.3d 207 (3d Cir. 2005) 7

United States v. *Luebbert*, 411 F.3d 602 (6th Cir. 2005) 7, 8

United States v. *Maldonato*, 410 F.3d 1231 (10th Cir. 2005) 8

United States v. *Reeves*, 410 F.3d 1031 (8th Cir. 2005) 7

United States v. *Rodriguez*, 398 F.3d 1291 (11th Cir.), cert. denied, 125 S. Ct. 2935 (2005) 9

United States v. *Smith*, 413 F.3d 778 (8th Cir. 2005) 8

United States v. *Vanonden*, 414 F.3d 1321 (11th Cir. 2005) 10

Constitution, statute and regulations:

U.S. Const. Amend. VI 5, 6, 8, 10

18 U.S.C. 371 ..... 1, 4, 6

18 U.S.C. 3742 2

18 U.S.C. 3742(b) 3

United States Sentencing Guidelines:

§ 2 F1.1 4

§ 2 X 1.1(a) 4

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-10a) is reported at 396 F.3d 1330.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 2005. A petition for rehearing was denied on March 10, 2005 (Pet. App. 1a). The petition for a writ of certiorari was filed on June 7, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In the United States District Court for the Southern District of Florida, petitioner pleaded guilty to conspiracy to commit mail fraud, in violation of 18 U.S.C. 371. She was sentenced to 48 months of imprisonment, to be

followed by three years of supervised release, and was ordered to pay restitution. The court of appeals dismissed petitioner's appeal. Pet. App. 2a-10a.

1. From 1998 to 2000, petitioner and her sons operated a fraudulent telemarketing scheme. Although the conspirators falsely told investors that their money was being invested in options to buy and sell foreign currency, the funds were actually used to enrich petitioner and her sons. To conceal the fraud, the conspirators laundered the money through check-cashing stores in South Florida and transferred the proceeds to banks in Miami and Tampa. Petitioner and her co-conspirators obtained $11.7 million from investors as a result of the scheme. Gov't C.A. Br. 4-5.

2. Petitioner was charged with 63 counts relating to her fraudulent telemarketing operation. Pet. App. 3a. In August 2003, petitioner entered into a plea agreement that resulted in, *inter alia*, her plea of guilty to a single count of conspiracy to commit mail and wire fraud. *Ibid.* The agreement also provided that petitioner would be sentenced under the federal Sentencing Guidelines, and that the district court could "impose a statutory maximum term of imprisonment of up to five (5) years." Plea Agreement para. 4; see Pet. App. 9a. The plea agreement also contained the following appeal waiver provision:

> The defendant is aware that Title 18, United States Code, Section 3742 affords the defendant the right to appeal the sentence imposed in this case. Acknowledging this, in exchange for the undertakings made by the United States in this plea agreement, the defendant hereby waives all rights conferred by Title 18, United States Code, Section 3742 to appeal any sentence imposed, including any resti-

> tution order, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure from the guideline range the Court establishes at sentencing. The defendant further understands that nothing in this plea agreement shall affect the government's right and/or duty to appeal as set forth in 18 U.S.C. § 3742(b). However, if the United States appeals the defendant's sentence pursuant to Section 3742(b), the defendant shall be released from the waiver of appellate rights. The defendant understands that, although the defendant will be sentenced in conformity with the Sentencing Guidelines, by this agreement the defendant waives the right to appeal the sentence on the basis that the sentence is the result of an incorrect application of the Sentencing Guidelines.

Plea Agreement para. 13; see Pet. App. 5a.

The district court held two plea hearings in this case. At the first hearing, on May 15, 2003, the district court told petitioner that she would be sentenced under the Sentencing Guidelines. 05/15/03 Tr. 23. The court also explained to petitioner that the "maximum term of imprisonment" was five years, which was the "worst possible sentence." *Id.* at 28-29. The court then discussed the appeal-waiver provision. *Id.* at 32-34. After consulting with her attorney on that point, petitioner stated that she agreed to waive her appeal rights. *Id.* at 34-35. Later in the hearing, however, petitioner stated that she was unsure about her guilty plea. *Id.* at 37-38. The district court declined to take her plea and set the case for trial. *Id.* at 38.

At the second hearing, on August 27, 2003, petitioner pleaded guilty, and the court accepted her plea. Gov't

C.A. Br. 8; see Pet. App. 3a. At the suggestion of petitioner's counsel, the court incorporated the plea discussion conducted at the earlier hearing. Gov't C.A. Br. 8.

3. The Presentence Report (PSR) calculated petitioner's Guidelines sentencing range as 78-97 months of imprisonment, based on an offense level of 28 and a criminal history category of I. Under Guidelines §§ 2X1.1(a) and 2F1.1, petitioner's base offense level was 6. Petitioner received a 15-level enhancement because her offense resulted in a loss of $11.7 million; a two-level adjustment because the offense involved more than minimal planning; a two-level adjustment because the offense involved mass marketing; a two-level adjustment because the offense involved relocating the fraudulent scheme to another jurisdiction to avoid detection, as well as sophisticated means; and a four-level enhancement for petitioner's leadership role in the offense. Petitioner's offense level was reduced three levels for acceptance of responsibility. Gov't C.A. Br. 12-13.

At sentencing, the district court generally adopted the PSR's proposed Guidelines calculations but ruled that a two- rather than a four-level leadership enhancement was appropriate. 01/22/04 Tr. 58-59. The effect of that ruling was to fix petitioner's total offense level at 26. Under 18 U.S.C. 371, petitioner was subject to a statutory maximum term of 60 months of imprisonment. 01/22/04 Tr. 76. The district court departed downward three levels to a sentencing range of 46 to 57 months and sentenced petitioner to 48 months of imprisonment. *Id.* at 85.

4. Petitioner appealed her sentence, filing her opening brief on June 21, 2004. Petitioner challenged the manner in which her Guidelines range had been calculated (Pet. C.A. Br. 6-14), but she did not raise any claim

under the Sixth Amendment. Relying on the appeal-waiver provision of petitioner's plea agreement, the government moved to dismiss the appeal. See Pet. App. 4a. In her reply to the motion to dismiss, petitioner contended that her Guidelines sentence violated the Sixth Amendment as construed by this Court in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). See Pet. App. 4a. The Court's decision in *Blakely* was issued on June 24, 2004, three days after petitioner's opening brief was filed. Petitioner contended that the appeal-waiver provision did not encompass her *Blakely* claim because "the sentence imposed on her exceeded the 'statutory maximum' as defined in *Blakely* and her waiver explicitly excepted sentences in excess of the statutory maximum." *Ibid.*

5. On January 12, 2005, while the government's motion to dismiss petitioner's appeal was pending before the Eleventh Circuit, this Court issued its decision in *United States* v. *Booker*, 125 S. Ct. 738. The Court held that the federal sentencing scheme enacted by Congress, under which the sentencing court rather than the jury finds facts that establish a mandatory Guidelines range, is inconsistent with this Court's decisions in *Apprendi* and *Blakely*. *Id.* at 748-756 (opinion of Stevens, J.). The Court further held that the constitutional infirmity was most appropriately eliminated by severing the statutory provisions that mandate sentences within the applicable Guidelines range, leaving a sentencing scheme in which the Guidelines range is advisory and federal sentences are reviewable for unreasonableness. *Id.* at 757-769 (opinion of Breyer, J.).

6. The court of appeals dismissed petitioner's appeal. Pet. App. 2a-10a. The court noted that it "ha[d] previously upheld the enforceability of appeal waivers

that are knowingly and voluntarily entered." *Id.* at 2a. Based on its examination of the record in this case, the court found that petitioner's waiver was knowing and voluntary. *Id.* at 3a.

The court of appeals rejected petitioner's contention that the exception in the appeal-waiver provision for sentences above the "maximum permitted by statute" encompassed her Sixth Amendment challenge. Pet. App. 5a-10a. The court explained that plea agreements, like contracts generally, should be interpreted in accordance with the intent of the parties. *Id.* at 7a-8a. The court found that the phrase "exceeds the maximum permitted by statute" was most naturally understood to "describe[] the upper limit of punishment that Congress has legislatively specified for violation of a statute"—in this case, "five years for violation of 18 U.S.C. § 371"—and it found nothing in the record suggesting that the parties to petitioner's plea agreement intended the phrase to have a different meaning. *Id.* at 8a. The court also explained that another provision in the plea agreement used the phrase "statutory maximum term" to refer to the five-year term of imprisonment authorized by 18 U.S.C. 371. Pet. App. 9a. The court of appeals concluded that, "[i]f we were to read the language in the appeal waiver provision in this same agreement to mean anything else, we would be interpreting materially identical terms in the same contract to mean substantially different things. That we will not do." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 5) that the court of appeals erred in dismissing her appeal based on the appeal-

waiver provision of her plea agreement. That claim lacks merit, and further review is not warranted.[1]

1. Eight other courts of appeals, in addition to the Eleventh Circuit, have considered whether appeal-waiver provisions in pre-*Booker* plea agreements precluded defendants from raising *Booker* claims on appeal. Those courts have uniformly enforced the appeal-waiver provisions in question. See *United States* v. *Bond*, 414 F.3d 542, 544-546 (5th Cir. 2005); *United States* v. *Haynes*, 412 F.3d 37, 38-39 (2d Cir. 2005) (per curiam); *United States* v. *Luebbert*, 411 F.3d 602, 603-604 (6th Cir. 2005); *United States* v. *Reeves*, 410 F.3d 1031, 1034-1035 (8th Cir. 2005); *United States* v. *Johnson*, 410 F.3d 137, 151-153 (4th Cir. 2005); *United States* v. *Lockett*, 406 F.3d 207, 212-214 (3d Cir. 2005); *United States* v. *Green*, 405 F.3d 1180, 1188-1195 (10th Cir. 2005); *United States* v. *Bownes*, 405 F.3d 634, 635-638 (7th Cir. 2005). Petitioner does not discuss those decisions, nor does she contend that a circuit conflict exists on this issue.

2. Under paragraph 13 of her plea agreement, petitioner "waive[d] all rights * * * to appeal any sentence imposed, * * * or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure from the guideline range the Court establishes at sentencing." Plea Agreement para. 13; see Pet. App. 5a. Petitioner contends that her sentence exceeded the statutory maximum and that the appeal-

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[1] In *United States* v. *Grimard-Henry*, 399 F.3d 1291, 1296 (11th Cir.), cert. denied, 125 S.Ct. 2279 (2005) (No. 04-9566), this Court recently denied a petition for a writ of certiorari that sought review of a substantially similar question. There is no reason for a different result here.

waiver provision is therefore inapplicable here. That claim is incorrect.

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), this Court held, as a matter of federal constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely*, the Court stated that the "statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 124 S. Ct. at 2537 (emphasis and internal quotation marks omitted). Petitioner contends that her plea agreement's reference to the "maximum [sentence] permitted by statute" should be construed in the same manner. Pet. 5; see Pet. App. 4a, 6a.

The courts of appeals have uniformly rejected similar claims, holding that, when an appeal-waiver provision of a plea agreement contains an exception for sentences above the "statutory maximum," the term "statutory maximum" refers to the maximum sentence that is authorized by the statute of conviction, without regard to any further restrictions that this Court's Sixth Amendment jurisprudence may impose in a particular case. See, *e.g.*, *United States* v. *Smith*, 413 F.3d 778, 780-781 (8th Cir. 2005); *United States* v. *Cortez*, 413 F.3d 502, 503 (5th Cir. 2005); *Luebbert*, 411 F.3d at 603; *United States* v. *Maldonato*, 410 F.3d 1231, 1233 (10th Cir. 2005); *United States* v. *Blick*, 408 F.3d 162, 169 n.7 (4th Cir. 2005) (collecting cases). That interpretation of the appeal waiver reflects a recognition that the parties to a plea agreement normally intend that terms appearing in the contract will be given their ordinary and natural

meaning, and that the ordinary meaning of "statutory maximum" is the maximum sentence authorized by the statute of conviction. See *Cortez*, 413 F.3d at 503; *Green*, 405 F.3d at 1193. There is no reason to give a different construction to the phrase "maximum [sentence] permitted by statute" as it appears in the appeal-waiver provision of petitioner's plea agreement.

As the court of appeals recognized (Pet. App. 9a), another provision of petitioner's plea agreement reinforces the natural reading of the disputed appeal-waiver language. Paragraph 4 of the agreement states that the district court at sentencing "may impose a statutory maximum term of imprisonment of up to five (5) years." Plea Agreement para. 4; see Pet. App. 5a. "In that provision, 'statutory maximum' unquestionably means the maximum permitted by the statute itself, undiminished by any *Apprendi/Booker* considerations." *Id.* at 9a. Under petitioner's construction of the appeal-waiver provision, "materially identical terms in the same contract" would be given "substantially different" meanings, a result at odds with established contract-law principles. *Ibid.*

Finally, under the remedial holding of this Court in *Booker*, the district court in this case *was* authorized to increase petitioner's sentence based on the court's own factual findings, up to the maximum set forth in the statutes defining the offense of conviction. See 125 S. Ct. at 750, 768-769. The constitutional error in Guidelines sentences imposed before *Booker* resulted not from the fact that sentencing courts relied on their own findings in determining the applicable Guidelines ranges. Instead, it resulted from the courts' treatment of such Guidelines ranges as mandatory rather than advisory. See, *e.g.*, *United States* v. *Rodriguez*, 398 F.3d 1291, 1301 (11th

Cir.), cert. denied, 125 S. Ct. 2935 (2005). As a result of the Court's remedial holding in *Booker*, petitioner cannot complain about the *duration* of her sentence, but only could say that it was imposed by the wrong process (*i.e.*, a mandatory one). That does not translate into a claim that she received a sentence above the "maximum permitted by statute."

3. The petition for a writ of certiorari raises no legal issue of broad and recurring importance. Now that this Court has issued its decision in *Booker*, district courts can be expected to treat the federal Sentencing Guidelines as advisory rather than mandatory. To the extent that defendants entering into appeal-waiver agreements wish to preserve their right to appeal allegedly "unreasonable" sentences, see *Booker*, 125 S. Ct. at 765-767, they can bargain for contractual language that clearly reflects that intent. The number of cases that would be affected by this Court's resolution of the question presented is limited and can be expected to diminish with time.

4. Even if the appeal-waiver provision of petitioner's plea agreement were construed not to encompass her *Booker* claim, it is unlikely that she would obtain any relief in the Eleventh Circuit. Because petitioner did not raise a Sixth Amendment challenge to her sentence at trial or in her opening brief on direct appeal, the court of appeals would likely treat that claim as abandoned. See, *e.g.*, *United States* v. *Vanouden*, 414 F.3d 1321, 1322-1323 (11th Cir. 2005); cf. Pet. App. 4a n.1 (noting, but expressing no view on the merits of, the government's contention that petitioner's *Booker* claim was "procedurally barred"). In addition, under the remedial approach adopted in *Booker*, the only relief to which petitioner could even arguably be entitled is a remand

for resentencing under the current advisory Guidelines regime. Because the district court departed downward from the applicable Guidelines range at the original sentencing proceeding (see p. 4, *supra*), there is no reason to suppose that the court would have imposed a more lenient sentence if it had treated the Guidelines as advisory rather than mandatory.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2005